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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1980

NO. 80-6845

DONALD GENE BOAG,

Petitioner,

vs.

ELLIS MACDOUGALL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; and, WILLIAM RHODE, SUPERINTENDENT OF ALHAMBRA RECEPTION AND TREATMENT CENTER,

Respondents.

IN FORMA PAUPERIS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD GENE BOAG
ARIZONA STATE PRISON
BOX B 32655
FLORENCE, AZ. 85232

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I

JURISDICTION

This courts jurisdiction is invoked pursuant to 28 U.S.C. 1254.

II

OPINIONS BELOW

On March 3,1981, the court below(APPENDIX A)affirmed the District Courts summary dismissal of petitioners 42 U.S.C. 1983 action/ complaint(APPENDIX B). On June 2nd, 1981, petitioners Petition for Rehearing and Suggestion for Rehearing In Banc was denied(APPENDIX C).

III

QUESTIONS PRESENTED

1. WHETHER CERTAIN CAUSES OF ACTION ALLEGING CIVIL/CONSTITUTIONAL VIOLATIONS IN ONE PRISON CAN BE MOOTED BY A SUBSEQUENT TRANSFER TO ANOTHER PRISON?

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURTS DISMISSAL ORDER ON DIFFERENT GROUNDS THAN THAT GIVEN BY THE DISTRICT COURT?

3. WHETHER A 42 U.S.C.1983 COMPLAINT IS FRIVILOUS WHEN IT ALLEGES, INTER ALIA, THAT PETITIONER WAS PLACED IN "THE HOLE" FOR SEVERAL DAYS, WITH LOSS OF ALL PRIVILEGES, AND WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS BEING OBSERVED, I.E.-NO NOTICE OF CHARGE, AND NO OPPORTUNITY TO BE HEARD AND TO DEFEND?

4. WHETHER THE COURT BELOW ERRED IN NOT REVERSING AND REMANDING CASE TO DISTRICT COURT WITH DIRECTIONS ALLOWING PETITIONER TO FILE AN AMENDED COMPLAINT?

5. WHETHER DISTRICT COURT AND COURT BELOW ERRED IN NOT HOLDING THE MARSHAL SHOULD HAVE SERVED THE COMPLAINT/SUMMONS ON THE DEFENDANTS PRIOR TO THE SUMMARY DISMISSAL ORDER?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

14TH AMENDMENT TO THE FEDERAL CONSTITUTION

V

STATEMENT OF CASE

On Feb. 29,1980, petitioner was received by the Arizona Department of Corrections"Reception and Treatment Center", Phoenix, Arizona, where his legal documents were immediately taken from him(but, later returned after petitioner threatened legal action).

Prescribed eye medication was also confiscated,and an ineffective eye medication substituted therefor.

While at said Reception and Treatment Center,administered and operated pursuant to the rules and regulations fixed by the two Respondents,petitioners following requests were denied;(1)participation in church services;(2)a visit from a friend;(3)exercise outside and fresh air(4)access to law library/law books;and (5)access to a canteen/commissary. All requests were denied on the grounds that none of the foregoing were available to inmates at that particular institution.

On March 3,1980,petitioner was placed in "the hole" (with loss of all privileges)by an alleged drunken guard(a Sgt. Robertson) without a charge,without a notice of charge,and without an opportunity to be heard and to defend before a disciplinary committee. Petitioner remained in "the hole" until transferred to the Arizona State Prison at Florence,Az. on March 12,1980. The alleged cause of petitioners placement in "the hole" was his refusal to accept the substituted eye medication which was totally ineffective for his eye problem(i.e.- an infected eye socket. Petitioners right eyeball was enucleated in July,1966).

VI

REASONS FOR GRANTING THE WRIT

I

CERTAIN CAUSES OF ACTION ALLEGING CONSTITUTIONAL/CIVIL VIOLATIONS IN ONE PRISON CANNOT BE MOOTED BY TRANSFER TO ANOTHER PRISON.

Very simply,can a cause of action alleging,e.g.- placement in "the hole" without procedural due process/14th Amendment rights being observed become moot upon transfer to another prison(within the state system)? It is conceded that a cause of action could be moot for injunctive relief, but,not for compensatory damages.See, Lokey v. Richardson(9th Cir. 1979) 600 F.2d 1265,cert.denied 101 S.Ct. 238

II

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURTS DISMISSAL ORDER ON DIFFERENT GROUNDS THAN THAT GIVEN BY THE DISTRICT COURT.

As set forth in Argument One, the Court of Appeals affirmed the District Courts dismissal order for a different reason than that given by the District Court.

The District Court dismissed the complaint/action as being moot. Thereafter, the court below affirmed on a different ground, i.e.- that the complaint failed to state a claim upon which relief can be granted and was therefore frivilous. It must be remembered that on appeal, per a summary denial, the facts as set forth in the complaint must be deemed true.

Certainly, such "changing horses in the middle of the stream" took from petitioner the right to respond to such ground, and was error.

III

A 42 U.S.C. 1983 COMPLAINT IS NOT FRIVILOUS WHEN IT ALLEGES, INTER ALIA, THAT PETITIONER WAS PLACED IN "THE HOLE" FOR SEVERAL DAYS, WITH LOSS OF ALL PRIVILEGES WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS BEING OBSERVED, I.E.-THERE WAS NO NOTICE OF CHARGE AND NO OPPORTUNITY TO BE HEARD AND TO DEFEND.

As set forth above, petitioner was placed in "the hole" for several days at the Reception and Treatment Center because he declined the ineffective eye medication. While in "the hole", petitioner lost all privileges accorded other inmates. At no time was petitioner charged with a rule or regulation infraction or was he ever given an opportunity to be heard and to defend regarding being placed in "the hole", and [redacted] losing his privileges. Certainly, it would seem, according th this courts opinions in Enomoto v. Clutchette, 425 U.S. 308, and Wolff v. McDonnell, 418 U.S. 539, such action by the respondents deprived petitioner of due process of the law guaranteed by the 14th Amendment to the UNITED STATES CONSTITUTION.

Can it be said such an allegation is frivilous and does not state a claim upon which relief can be granted??? See,eg.-Cruz v. Beto, 405 U.S. 319;Haines v. Kerner ,404 U.S. 519;Gillespi v. Civiletti (9th Cir. 1980)629 F.2d 631.[1]

Petitioner affirmatively contends that he is entitled to prove his allegations (Haines v. Kerner,supra,) ,and that his allegations clearly state claims upon which relief can be granted(Cruz v. Beto, supra).

IV

THE COURT BELOW ERRED IN NOT REVERSING AND REMANDING CASE TO DISTRICT COURT WITH DIRECTIONS ALLOWING PETITIONER TO FILE AN AMENDED COMPLAINT.

If the court below felt,in any manner, the complaint was unclear (as opposed to frivilous), it should have sent the case back to the District Court with directions that petitioner be allowed to file an amended complaint.See,Broughton v. Cutter Labratories,et al (9th Cir. 1980) 622 F.2d 458;and,Potter v. McCall(9th Cir. 1970) 433 F.2d 1087.

V

THE DISTRICT COURT SHOULD HAVE ORDERED THE U.S. MARSHAL TO SERVE SUMMONS/COMPLAINT ON THE DEFENDANTS PRIOR TO DISMISSING THE ACTION.

Petitioner contends that the 9th Circuit cases of Potter v. McCall, supra,and Crawford v. Bell (9th Cir. 1979) 599 F.2d 890, stand for the proposition that a District Court Judge is not supposed to use summary dismissal when he merely thinks the facts described in the complaint do not show that federal rights were violated,and that as long as the District Court agrees the suit would qualify for Section 1983 if petitioner suffered the violations he says he suffered, the court is required to (1) have the legal papers served on the defendants,(2)wait for the defendants to move to dismiss the complaint/action,(3) make sure petitioner gets a copy of their motion

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[1] Also, can it be said the allegation of no prison law library at said Reception and Treatment Center is a frivilous allegation??? See Younger v. Gilmore ,404 U.S.15;Bounds v. Smith(1977)430 U.S.817.

and a chance to submit a written memorandum in opposition,(4)send petitioner a statement of his reasons for granting the defendants motion,and (5) give petitioner a chance to amend the complaint.

In the present case, the District Court held the claims were "moot",[2] and on this basis,summarily dismissed the complaint/action . Then the court below affirmed on a different ground,i.e.- the claims were frivilous. Petitioner submits that the rationale of Potter and Crawford come into play in this type of situation. In other words, he feels the pleading/issue of mootness should have been made by the defendants on a motion to dismiss after having been served with the complaint/summons. It is submitted that the court below should have held this way.

VI

CONCLUSION

Because of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Donald Gene Boag

COPY OF THE FOREGOING PET.FOR WRIT OF CERTIORARI MAILED THIS 9th DAY OF June,1981 TO:JAY ADKINS,ASS'T. ATTY. GEN.,WEST ADDITION- 2nd FLR., 1700 W. WASHINGTON,PHOENIX,AZ. 85007

I, Donald Gene Boag, declare under the penalty of perjury that the foregoing is true and correct.

DATED: June 9th 1981

Donald Gene Boag

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[2] However,the court below used the term "frivilous". Quite a distinction!

FILED

MAR 3 1981

RICHARD H. DEANE
CLERK, US COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD G. BOAG, Plaintiff-Appellant, vs. ELLIS MacDOUGALL, Director, Arizona Department of Corrections, Defendant-Appellee.	No. 80-5283 DC 80-224-PHX-WPC MEMORANDUM

Appeal from the United States District Court
for the District of Arizona

William P. Copple, District Judge, Presiding

Submitted: February 12, 1981

Before: SNEED and KENNEDY, Circuit Judges, and HEMPHILL,* District Judge.

Donald G. Boag, a state prisoner, brought a civil rights action under 42 U.S.C. § 1983 challenging the conditions of confinement of a prison from which he had been transferred. Ruling on a motion to proceed in forma pauperis, the lower court summarily dismissed the complaint. We affirm.

A civil rights complaint brought by a state prisoner proceeding in forma pauperis may be dismissed summarily by the district court pursuant to 28 U.S.C. § 1915(d) when the complaint is frivolous. Milton v. Nelson, 527 F.2d 1158, 1160 (9th Cir. 1975); Boag v. Boies, 455 F.2d 467, 468 (9th Cir.) (per curiam), cert. denied, 408 U.S. 926 (1972). Moreover, the discretion of lower courts in § 1915(d) dismissals is "especially broad" in civil rights actions against prison officials, and such dismissals will not be reversed in the absence of an abuse

*Honorable Robert W. Hemphill, Senior United States District Judge for the District of South Carolina, sitting by designation.

of that discretion. Milton, supra. The lower court did not abuse its discretion in this case, for the complaint fails to state causes of action upon which relief can be granted and is therefore frivolous.

AFFIRMED.

1

2

FILED

MAR 25 1980

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DONALD G. BOAG, Plaintiff, vs. ELLIS MacDOUGALL, Director, Arizona Department of Corrections, et al., Defendants.	No. Civ. 80-224 Phx. WPC O R D E R

Plaintiff, an Arizona State Prison inmate pro per, has lodged a prisoner civil rights complaint together with an affidavit of indigency and request for leave to file and proceed in forma pauperis.

It is apparent from the face of the complaint that the claim is moot.

IT IS ORDERED:

1. Leave to file in forma pauperis is granted; leave to so proceed is denied.

2. The complaint and action are dismissed and the Clerk will enter judgment accordingly.

DATED March 25, 1980.

United States District Judge

FPI-SST-10-79
12500-1226

FILED

UNITED STATES COURT OF APPEALS JUN 2 1981

FOR THE NINTH CIRCUIT

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

DONALD G. BOAG,

Plaintiff-Appellant,

vs.

ELLIS MacDOUGALL, Director, Arizona Department of Corrections,

Defendant-Appellee.

No. 80-5283

ORDER

Before: SNEED and KENNEDY, Circuit Judges, and HEMPHILL,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for a rehearing en banc, and Judge Hemphill has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Robert W. Hemphill, Senior United States District Judge for the District of South Carolina, sitting by designation.

FFI-68-13-6-78

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OCTOBER TERM 1980

NO. 80-6845

DONALD GENE BOAG,

Petitioner,

against

ELLIS MACDOUGALL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; and, WILLIAM RHODE, SUPERINTENDENT OF ALHAMBRA RECEPTION AND TREATMENT CENTER,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN FORMA PAUPERIS

Petitioner, Donald Gene Boag, respectfully moves the court for leave to proceed in forma pauperis with the attached Petition for Writ of Certiorari.

Petitioner is an indigent prison inmate with no funds excepting the menial wages he earns on his prison job, i.e.-chopping weeds on the "gun gang"; he owns no property, no motor vehicles, and has no income thus he cannot pay the various fees/costs in this proceeding or give security therefor. He declares under penalty of perjury that the foregoing is true and correct .

DATED: June 9th 981

Respectfully Submitted,

Donald Gene Boag

Donald Gene Boag

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-6845

DONALD GENE BOAG,

Appellant-Petitioner,

v.

ELLIS MacDOUGALL, Director, Arizona Department of Corrections; and WILLIAM RHODE, Superintendent of Alhambra Reception and Treatment Center,

Appellees-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-6845

DONALD GENE BOAG,

Appellant-Petitioner,

v.

ELLIS MacDOUGALL, Director, Arizona Department of Corrections; and WILLIAM RHODE, Superintendent of Alhambra Reception and Treatment Center,

Appellees-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Ellis MacDougall, et al., through the Arizona Attorney General, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's disposition of this case on or about June 2, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record present a reason for the grant of certiorari.

Petitioner argues that the District Court erred when it dismissed his pro se civil rights action brought pursuant to 42 U.S.C. § 1983 for the reason that it was moot because Petitioner had been transferred from that prison prior to the time the complaint was filed. He was transferred from the facility complained of on March 12, 1980 and his complaint herein was filed on March 25, 1980. He argues that because his claim contained a prayer for compensatory and punitive damages the claim is not moot as to those allegations.

Lokey v. Richardson, 600 F.2d 1265, cert. denied 101 S.Ct. 238 (9th Cir. 1979) involved a well developed record upon which the court determined that a claim for damages had been developed. In this case, however, it was clear to both lower courts that the claim asserted was frivolous. As was stated in Tawwab v. Metz, 544 F.2d (2nd Cir. 1977), where the plaintiff's claim was held moot, "Any award of damages on the facts of this case, as alleged in the complaint, would be so remote and speculative that it could not stand." 554 F.2d at 24, n.4.

It is clear that this case was treated as a proceeding in forma pauperis by both lower courts. As such, Title 28, U.S.C. § 1915(d) provided for summary dismissal by the court when the complaint is found to be frivolous.

Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1975); Boag v. Boies, 455 F.2d 467 (9th Cir.) (per curiam), cert. denied, 408 U.S. 926 (1972). The discretion of lower courts under § 1915(d) is "especially broad" in civil rights actions against prison officials, and such dismissals will not be reversed in the absence of an abuse of that discretion. Milton, supra.

Here, the Petitioner has shown no abuse of the lower court's discretion, and the appellate court's affirmation is proper. For the appellate court to affirm for the reason that it found the complaint frivolous as opposed to moot is of no significance. No authority is cited by Petitioner to show that as improper. Certainly a moot issue could be considered frivolous within the meaning of that word. What could be more frivolous than a complaint which appears moot on its face?

A case strikingly similar to the case sub judice is Boag v. Boies, 455 F.2d 467 (9th Cir.), cert. denied, 408 U.S. 926, 92 S.Ct. 2509, 33 L.Ed.2d 338 (1972). In Boag the appellant appealed from an order of the District Court denying his motion for leave to proceed in forma pauperis in a civil rights complaint against certain Arizona deputy sheriffs. The reason stated for such denial was that Boag failed to state a claim for which relief could be granted. In affirming the District Court's ruling, the Ninth Circuit Court of Appeals noted that the District

Court acted without notice to Boag that the court was considering dismissal of the complaint, without affording Boag an opportunity to submit written argument, and without affording him an opportunity to amend his complaint. The court further noted that if the court's action constituted dismissal of the action with prejudice for failure to state a claim upon which relief could be granted, it would be necessary to reverse. Id. at 468. However, the court ruled as follows:

> "But what was pending before the district court was plaintiff's motion to proceed in forma pauperis. Under 28 U.S.C. § 1915(d), a case sought to be prosecuted in forma pauperis may be dismissed if the district court correctly determines that it is frivolous. While the district court did not here expressly rule that this case is frivolous, we think this is the real reason for the court's denial of the motion to proceed in forma paupers and conclude that it is a sound reason." 455 F.2d at 468-469.

Under 42 U.S.C. § 1915(d) where the petitioner has been granted leave to proceed in forma pauperis but the court subsequently determines that the complaint is frivolous or malicious, it can be dismissed without

service of process. Watson v. Ault, 525 F.2d 886 (5th Cir. 1976); Forester v. California Adult Authority, 510 F.2d 58 (8th Cir. 1975); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

Once a claim is rendered moot, it will always remain moot and that very same issue can never again be "live." Therefore, it would have been futile for the Court of Appeals to have ordered the case to be remanded with directions to file an amended complaint because the deficiency could not possibly have been cured by the amendment.

The Petitioner's allegation of violation of the Fourteenth Amendement's due process clause by being placed in "the hole" is also insufficient to state a claim upon which relief may be granted and is legally frivolous. A transfer to "the hole" or other higher or stricter custody level does not by itself constitute a violation of the due process clause of the Fourteenth Amendment. Montanye v. Haymes, 427 U.S. 236, 242, 96 S.Ct. 2543, Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

The original complaint does not contain any allegations which show that the State of Arizona has established a procedure, the violation of which might give rise to a claim of denial of due process of law. Wright v. Enomoto, 462 F.Supp. 297(N.D. Cal. 1976), aff'd 343 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978). However, even assuming that such

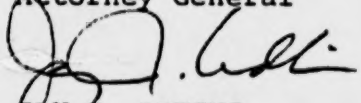
rules were in existence at the time of the alleged violation, procedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest. Bills v. Henderson, 631 F.2nd 1287 (6th Cir. 1980). Every deviation from state procedures cannot be viewed as a federal constitutional violation, Id. A.R.S. § 41-1604 (B)(2) places transfers of "adult inmates between adult institutions or adult facilities" in the discretion of the Director of the Department of Corrections. Therefore, a claim that an administrative transfer to a higher custody level pursuant to a statute vesting that authority in the Director of the Department of Corrections is frivolous.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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